Supreme Court, U.S.
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IN THE

Supreme Court of the United States

JAMES DICKEY,

Petitioner

v.

JAMES WARREN,

Respondent.

In Petition For A Writ Of Certiorari
To The Supreme Court of Massachusetts

PETITION FOR WRIT OF CERTIORARI

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BEST AVAILABLE COPY

QUESTION PRESENTED

Whether Massachusetts anti-SLAPP statute, being Massachusetts General Laws chapter 231, § 59H (2005), is unconstitutional since it allows the City of Boston to conduct non-judicial hearings in which the City's witnesses have **absolute**[1] immunity for their false/defamatory testimony; which impinges on the Petitioner's First Amendment right to petition the Massachusetts Courts for redress of the false/defamatory testimony.

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[1] The testimony in question has absolute immunity since it is subject to neither civil suit nor the pains of perjury.

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Petition for a writ of Certiorari

James Dickey respectfully petitions for a Writ of Certiorari to review the final ruling of the Massachusetts Supreme Judicial Court in this case.

Opinions Below

The Massachusetts Supreme Judicial Court's order refusing discretionary review is unreported, and is attached as *Exhibit A*, at App. 1a. The opinion of the Massachusetts Court of Appeals is reported at MassCases.com as 75 Mass App Ct 585 (2009), and is attached as *Exhibit B.* at App. 2a-14a.

Jurisdiction

The Massachusetts Supreme Court denied the Petitioner's Petition for Further Appellate Review on December 22, 2009. Jurisdiction of this Court is invoked under 28 U.S.C. § 1257.

Constitutional and Statutory Provisions Involved

The First Amendment to the United States Constitution provides in pertinent part that, "Congress shall make no law . . . abridging the freedom of speech . . . or to petition the

Government for a redress of grievances. The Fourteenth Amendment to the United States Constitution, Section 1, provides in pertinent part that, no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The pertinent provisions of Massachusetts Constitution Declaration of Rights, Article XI, which guarantees that every citizen "ought to find a certain remedy, by having recourse to the laws, for all injuries of wrongs which he may receive in his person, property, or character" *Mass. Const.* Pt. 1, Art XI. This guarantee is buttressed by the right to a jury trial in Article XV of the Declaration of Rights, which provides: "[i]n all controversies concerning property, and in all suits between two or more persons . . . the parties have a right to a trail by jury; and this method of procedure shall be held sacred . . ." *Mass Const.* Pt. 1, Art. XV.

The pertinent provisions of Massachusetts' anti-SLAPP, (Mass. General Laws chapter 231, § 59H (2005)), is reprinted in Appendix D, pages 15a-17a.

Statement of the Case[2]

Deliberate falsity and wanton, reckless disregard for the truth has never enjoyed an elevated constitutional value and merits no special constitutional protection here. Indeed, 25 years ago, this Court confirmed that this fundamental principle applies to the Petition Clause as well when it held that although "[t]he right to petition is guaranteed, the right to commit libel with impunity is not." *McDonald v. Smith,* 472 U.S. 479, 485 (1985).

But, in Massachusetts, "deliberate falsity and wanton, reckless disregard for the truth" now enjoys an elevated constitutional value, and merits special constitutional protection thanks to Massachusetts anti-SLAPP statue, (*Mass. General Laws* chapter 231, § 59H (2005)), which states in part:

> "In any case in which a party asserts that the civil claims . . . against said party are based on said party's exercise of its right of petition under the constitution of the United States or of the commonwealth, said party may bring a special motion to dismiss. . . . The

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[2] Please consider this footnote as a footnote for most of the petition for writ of certiorari, as the writ is a somewhat modified version of "The special motion requirements of the Massachusetts anti-SLAPP statute: A real slap in the face for traditional civil practice and procedure," Public Interest Journal Law, volume 16, (2006).

> court shall grant such special motion, unless the party against whom such special motion is made shows that: (1) the moving party's exercise of its right to petition was devoid of any reasonable factual support or any arguable basis in law and (2) the moving party's acts caused actual injury to the responding party. In making its determination, the court shall consider the pleadings and supporting and opposing affidavits stating the facts upon which the liability or defense is based"

Mass. General Laws, chapter 231, § 59H.

In the instant case the Petitioner, James Dickey, ("Dickey"), the former landlord of Respondent, James Warren, ("Warren"), brought an action in the Superior Court alleging that Warren knowingly submitted false testimony,[3] which defamed Dickey, during a hearing conducted by the City of Boston's Inspectional Services Department, ("City"), to determine if a prior condemnation of Dickey's residential apartment building should be modified or withdrawn, or why the dwelling should not be

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[3] In the instant case, Warren gave false testimony at the condemnation hearing for the purpose of insuring the condemnation would be upheld so that he could then sued the Petitioner, which he later did.

condemned.[4,5] Warren responded with a special motion to dismiss pursuant to G.L. c. 231, § 59 H, commonly referred to as the "anti-SLAPP statute." The Superior Court concluded that Warren had satisfied his burden of demonstrating that his remarks were protected petitioning activity, while Dickey had failed to demonstrate that Warren's

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[4] At the condemnation hearing Warren relayed, with actual malice, that just prior to the condemnation of the building that he vacated the apartment due to the horrendous condition of his apartment. But under oath, Warren later indicated that he was still residing in the building on the day the Inspector Kennedy condemned and boarded-up the building, and that he had not moved out of the apartment before the condemnation. (Warren's false statement indicating that he vacated the apartment due to the horrendous condition of the apartment was made at the very moment that the hearing officer was deciding if the building should remain vacant; the hearing officer's final decision indicates that he included Warren's testimony in deciding that the building should remain vacant). In the instant case, Warren has declined to further explain the discrepancy between these two statements.

[5] Please note that condemnation of a building in the City of Boston has dire consequences since it's the City's assertion that the possession and right-of-entry automatically transfers to the City when a building is condemned pursuant to 105 CMR 410.831 of the Massachusetts Sanitary Code, and in the instant case the City/Inspector Kennedy seized the Petitioner's building and refused him access for two months. To further explain, the City of Boston has unconstitutionally implemented a padlock law, (similar to New York City's padlock law, New York City Administrative Code § 7-706(a), which padlocks buildings were illegal activities occur), through it's interpretation of the Massachusetts Sanitary Code; in the instant case a neighbor had alleged that Warren was dealing drugs.

petitioning activity was devoid of any reasonable factual support or any arguable basis in law. Dickey appealed the decision to the Appeals Court, which then affirmed the lower Court's decision to dismiss Dickey's complaint. Dickey subsequently petitioned the Massachusetts Supreme Judicial Court, ("SJC"), for further appellate review, indicating that the process that the Appeals Court used to evaluate the special motion was flawed, as the process never evaluated the Petitioner's legitimate lawsuit.[6] In the petition submitted to the SJC, the Petitioner indicated that while he

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[6] The lawsuit that the Petitioner filed against Warren pertains to only a portion of Warren's involvement in a larger RICO conspiracy to extort the Petitioner. After Inspector Kennedy condemned the Petitioner's building, Kennedy then had the Massachusetts Attorney General attempt to have the building placed into receivership, (please note that the Petitioner's house was the only house in the City of Boston that the Attorney General petitioned the Housing Court for receivership that year). The Petitioner has filed a lawsuit in Federal Court for the other portion of the RICO extortion conspiracy, and that case is scheduled to go to trial April 2010. (To further explain how bad things are in Massachusetts, while the Petitioner has filed a lawsuit in Federal Court alleging that three associates attempted to extort the Petitioner's building, Martha Coakley, being the Attorney General for Massachusetts, has recently had one of named associates as a speaker for seminars promoting the receivership process. This same person was accused of fraud in *City of Boston v. Rochalska*, 72 Mass App Ct 236 (2008) (in the *Rochalska* case the Housing Court discovered that he, as receiver, submitted over $60,000 of false invoices to the Housing Court for reimbursement), and the Petitioner's RICO conspiracy case is just a continuation of the *Rochalska* case).

filed a complaint against Warren, alleging defamation, the Petitioner could (should) have filed a conspiracy complain in the Federal District Court against Warren's due to his involvement in the RICO enterprise; but to keep thing simple, he chose to filed a complaint in a Massachusetts court. The Petitioner further indicated that the Appeals Court's decision impinges on his constitutional right to petition a court to seek redress for his own grievances, as protected by the First Amendment, (*App.* 19a), which is protected against state action and deprivation by the Fourteenth Amendment. While the federal question of the Petitioner's right/access to the courts was timely and properly raised in response to the Appeals Court decision, the SJC declined to address the issue. *App.* 1a.

To further explain why the Massachusetts courts dismissed a legitimate lawsuit, one has to further analyze Massachusetts' anti-SLAPP statute. In *Duracraft*, the Massachusetts Supreme Judicial Court ("SJC") interpreted the phrase "devoid of any reasonable factual support" to be the functional equivalent of arguing that a petition is a "sham."[7] *Duracraft*, 691 N.E.2d at 943. The SJC expounded on this idea of detecting "sham" petitioning in its *Baker* decision, determining that the special motion requires the non-moving party to show "*by a preponderance of evidence* that the

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[7] *Duracraft*, 691 N.E.2d at 943 (Mass 1998) (stating that the anti-SLAPP statute protects a party's petitioning activity, "unless it can be shown to be sham petitioning").

[moving party] lacked any reasonable factual support for [its] petitioning activity."[8] *Baker*, 750 N.E.2d at 962 n.20. The SJC labeled this burden as a "heightened summary judgment standard",[9] (*Id. at 964*), but the process further clarified in *Baker* does not include a procedure to examine the plaintiff's complaint for its merits. The court's analysis is only concerned as to why the petitioning activity occurred, and not the actual content of the petition, (as apposed to United States Supreme Court's holding in *McDonald v. Smith*, that although "[t]he right to petition is guaranteed, the right to commit libel with impunity is not." *McDonald*, 472 U.S. 479 at 485.)

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[8] *Baker*, 750 N.E 2d 953, at 962 n.20 (Mass 2001) (holding that "[i]t is not enough for [the plaintiff] to show that [the defendant's] alleged petitioning activity, requesting broad environmental review, was based on an error of law; he must show that no reasonable person could conclude that there was [a basis in law] for requesting that review").

[9] *Id.* at 964 (citing *Duracraft*, 691 N.E.2d at 942 n.16) (citing Protect Our Mountain Env't, Inc. v. County of Jefferson, 677 P.2d 1361, 1368-69 (Colo. 1984)) (holding that where the citizens "assert a motion to dismiss predicated on the First Amendment right to petition the government for redress of grievances . . . the court should give the parties a reasonable opportunity to present all material pertinent to the motion and should treat the motion as one for summary judgment . . . to be resolved under the heightened standard we herein adopt"). *Cf.* Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986) (holding that judges evaluate competing facts by assuming the facts in favor of the plaintiff, and requiring the defending party moving for summary judgment to prove that no genuine issues of material fact exist and that the moving party is entitled to judgment as a matter of law).

Thus, the *Baker* Court concluded that Baker's burden as the non-moving party was to show that Parsons was engaged in "sham" petitioning when she submitted her letters about the harmful effects of Baker's land use activities to bird populations. The *Baker* Court found that Baker failed to meet this burden, reasoning that Parsons, a biologist who had conducted many environmental studies, was not without a factual basis in projecting that Baker's activities on his land would adversely affect the bird population located on his island.[10] *Baker*, 750 N.E.2d at 960.

The *Baker* Court's thought process is consistent with the opinion of the lower court in the instant case, being that the Massachusetts Courts look at the petition to see if any part of the defendant's petition has reasonable support; and in the instant case the lower courts concluded that Warren's petition was not a sham since his utterance of an single irrelevant fact, (being that the furnace for the apartment had malfunctioned months earlier), had reasonable support.[11] But, in the instant case, since Warren's petition was in

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[10] "The [Superior Court] judge further noted that neither Baker's allegations that other factors contributed to changes in the bird population, nor his contentions that Parsons wrongfully accused him of harming the bird habitat, would establish that Parsons' statements were without any factual basis." *Id.* at 960 n.15.

[11] Warren's testimony at the condemnation hearing consisted of a five-minute rant about the condition of his apartment, which included (but not limited to) the fact that the furnace had malfunctioned.

response to the City's decision to conduct the condemnation hearing, his petitioning activity has reasonable factual support.

To further explain, in evaluating an anti-SLAPP motion concerning a petition presented at a City initiated hearing, the Massachusetts Courts look to the City's "primary purpose" for having the hearing to see if the defendant's petition has a legitimate "primary purpose". And, if the defendant did not initiate the hearing, then the defendant would always have a legitimate "primary purpose" since his petition would be in response to the City's decision to have the hearing; and, even if the defendant's testimony was false and defamatory, the petition still qualifies for absolute immunity under the Massachusetts anti-SLAPP statute because the statute does not further analyze the content of the petition. This is similar to how in the instant case that the Appeals Court came to the conclusion that since Warren's testimony was duplicative of Inspector Kennedy's testimony, that Warren's testimony did not caused injury.[12] *App.* 12a.

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[12] But, this attempt to hide behind the false testimony of Inspector Kennedy must fail. As previously stated, the Plaintiff has filed a conspiracy claim, pursuant to 18 U.S.C. § 1962, in the Massachusetts Federal Court against Inspector Kennedy for the condemnation of the Plaintiff's building, and for Kennedy's false testimony at the condemnation hearing. The RICO case, (*Dickey v. Kennedy*, 07-11717 NMG), is scheduled to go to trial April, 2010. In the RICO complaint, the Plaintiff alleges that Inspector Kennedy gave false testimony at the same condemnation

While the *Baker* Court specified that the special motion's heightened summary judgment review could implicate "multiple [other] considerations," including whether "the primary purpose [of the petition was] . . . to harass . . . or effectuate some other improper objective,"[13] (*Baker*, 750 N.E.2d at 961), but this further analysis still does not examine the plaintiff's complaint for its merits if the "primary purpose" is found elsewhere. The *Baker* Court did not expound upon how the court was to conduct a motive inquiry in instances where the plaintiff's claim itself is that the defendant's petitioning activity was driven by ill purpose. Furthermore, the *Baker* Court did not consider how, practically, a plaintiff is to demonstrate, pre-discovery, that the petitioner had *primarily* ill motives to the exclusion of other (legitimate) motives, but rather only directed future courts to grant special motions where the defendant's petitioning activity

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hearing, specifically but not limited to, Inspector Kennedy alleged that "[f]ront and rear common hall [were] missing" and that "[f]ront porches .. [were] pulling away from building". (Please note that the Appeals Court declined to include these "violations" in their laundry list of violation cited in footnote 8 of their decision, (*App* 14a)).

[13] *Baker*, 750 N.E.2d at 961 (Mass 20001) (citing *Duracraft*, 691 N.E.2d at 942 n.16) (citing *Protect Our Mountain Env't, Inc.*, 677 P.2d at 1369). Although the court suggests that a petitioner's motive may be considered under the "sham" test, the court did not provide any guidance as to how this type of evidence could be revealed, pre-discovery, under the special motion's procedures.

stood a reasonable chance of a successful outcome for the petitioner. [14] *Id.*

In summary, under the anti-SLAPP statute, the plaintiff's complaint, (as in the instant case), is never examined for its merits as it would be under common law practices; instead the reason for the petitioning activity is examined, and if the petitioning activity occurs during a City initiated hearing, the petitioning activity always has reasonable factual support.

Notice how a defendant's use of the anti-SLAPP's special motion to dismiss a claim alters traditional civil procedure. Without the option of filing a special motion, a defendant would have to file a motion to dismiss[15] or a motion for summary

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[14] *Id.* Despite the court's attempt to more clearly define the statute's burden of proof for the plaintiff seeking to defeat a special motion, the resulting "sham" test is itself vague and therefore the test is susceptible to inconsistent results in its application. *See, e.g., Donovan*, 740 N.E.2d at 645 (Brown, J., dissenting) (citing *Vittands*, 730 N.E.2d at 336-38) (arguing that the majority granted the special motion to dismiss in this case, but the motion should have been denied under *Vittands*, because the non-moving party in *Donovan* similarly met his burden of proving that the petitioning activity lacked merit).

[15] MASS. R. CIV. P. 12(b)(6) (2006) (dismissing a claim when a party "fail[s] to state a claim upon which relief can be granted"). *But see* Stuborn Ltd. P'ship v. Bernstein, 245 F. Supp. 2d 312, 315 (D. Mass. 2003) (holding that the Massachusetts anti-SLAPP statute's burden shifting procedures are trumped by the FED. R. CIV. P. 12(b)(6) in a diversity action in federal court).

judgment.[16] In either of these motions, the defendant carries a burden of persuasion when the plaintiff's complaint is viewed in the light most favorable to permitting the claim to go forward.[17] Under the special motion, however, the defendant merely demonstrates that he (the defendant) was engaged in "petitioning activity," and it is the plaintiff who carries the burden of proof in demonstrating the defendant's "sham" petitioning. The plaintiff's complaint is never examined for its merits.

The problem in Massachusetts is that, because the anti-SLAPP'S special motion has such widespread applicability,[18] (*Duracraft v. Holmes*, 691 N.E.2d 935, 941 n. 12), the motion's displacement of traditional civil procedure will take place much more frequently. In other words, the "absence of a [narrower] public concern requirement . . . [allows many more] litigants . . . to circumvent the more substantial burdens imposed by the more traditional tools for relief,

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[16] MASS. R. CIV. P. 56 (2006). Under a motion for summary judgment, the defendant alleges that, even after viewing the facts in the plaintiff's favor, the defendant is entitled to judgment as a matter of law.

[17] *See, e.g.*, Johnson v. Cooke, 17 Mass. L. Rptr. 517, 517 (Mass. Super. Ct. 2004).

[18] *See* Duracraft Corp. v. Holmes Prods. Corp., 691 N.E.2d 935, 941 (Mass. 1998) (noting that "other than [the Massachusetts anti-SLAPP Statute, the Massachusetts court is not] aware of [another] anti-SLAPP statute that fails to include a public concern).

e.g. motion to dismiss for failure to state a claim."[19,20]

To summarize, under *Duracraft*, whether a suit can be dismissed as a SLAPP is not dependent on the public or private nature of the petition; rather, courts can dismiss even wholly private suits as SLAPPs as long as the moving party was not engaged in "sham" petitioning. Although other states' versions of their anti-SLAPP statutes

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[19] Yvette Mendez, Sugarman, Rogers, Barshak & Cohen, P.C., *"SLAPP" Attack: Has* Public Concern Gone South in Massachusetts?, note 11, 42 B.B.J. 6 (1998).

[20] Needless to say, the definition of "public concern" has been greatly debated in other states. In defining "public concern", California's anti-SLAPP cites a statement made in a "public forum in connection with an issue of public interest"; but while California alternately defines a public concern as an "issue under consideration or review by . . . [an] executive . . . body", this definition has its limitations. *CAL. CIV. P.* § 425.16 (2004). For example, assuming that the City performs annual reviews of their employee, if the Petitioner was to attend Warren's annual review, and at his review was to submit false and defamatory statements about Warren, but also truthfully relayed to the City his involvement in the RICO enterprise, the Petitioner's statements would be protected just because of the forum that the false statement were relayed. Common sense must prevail, one can assume that Warren's annual review is not a public concern, and that the review is not open to the public. Similarly, the condemnation hearing conducted by the City for the Petitioner's building is not open to input from the public. The hearing procedures in 105 Code of Mass Regulation 410.853 states that "[a]t the hearing the petitioner and other affected parties shall be given an opportunity to be heard, to present witnesses or documentary evidence, and to show why an order should be modified or withdrawn, or why a dwelling should not be condemned, vacated or demolished ..." (emphasis added).

provide procedural benefits to the "petitioner," they generally allow the non-moving party to show its own claim has merit as opposed to solely proving the lack of merit in the moving party's "petition."[21] Thus, the *Baker* decision highlighted an important nuance in the Massachusetts anti-SLAPP statute as compared to its counterparts in other states.[22] *Baker,* at 962 n.19.

In *Adams v. Price (Whitman),* both the trial and Appeals Court recognized that the lack of a public interest requirement causes the special motion to conflict with traditional common law procedure.[23] *Adams v. Whitman*, 822 N.E.2d at 729. The Appeals Court noted, by interpreting the reach of the anti-SLAPP statute to include litigants whose private interests were equally at stake . . . the [SJC] reserved for future resolution the potential conflicts between the statute and accepted common-law principles. *Id.*

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[21] *See, e.g.*, CAL. CIV. P. § 425.16 (b)(1) (2004) (requiring moving party's to prove that they will likely prevail on their claims); Wilcox v. Superior Court of Los Angeles County, 27 Cal. App. 4th 809, 823-25 (Cal. Ct. App. 1994) (requiring the non-moving party to show its own claim has a "reasonable probability" of success, a threshold that is lower than "substantial probability").

[22] *Baker*, 750 N.E.2d at 962 n.19 (Mass 2001) (citing the anti-SLAPP statutes in fourteen different states and the various burdens of proof each statute delegates to moving and non-moving parties).

[23] *See* Adams v. Price, 14 Mass. L. Rptr. 633, 634 (Mass. Super. Ct. 2002), later heard by the Mass Appeals court as Adams v. Whitman, 822 N.E.2d 727 (Mass App. Ct 2005).

While the *Baker* Court concluded that "by protecting one party's exercise of its rights to petition, the [anti-SLAPP] statute impinges on the adverse party's exercise of its own right to petition," (*Baker*, 750 N.E.2d 953 (Mass 2003)); but by only analyzing the petitioning activity, the Massachusetts Courts are protecting false testimony contained in the defendant's petition, and impinging on the plaintiff's right to petition the Massachusetts Courts for their own grievance. The question the Petitioner presented to the lower courts was whether Respondent/Warren's petitioning activities or whether the factual statements contained in his "petition" are subject to the "factual support" analysis, as required by the anti-SLAPP statute. It is the Plaintiff's assertion that the content of the petition needs to be further analyzed for Massachusetts' anti-SLAPP statute to be constitutional.

By not analyzing the content of the defendant's petition, the Massachusetts Courts have not adhered to the "rule of statutory construction[, described by the *Queler* court,] that '[a] statute is not to be interpreted as effecting a material change in or a repeal of the common law unless the intent to do so is clearly expressed.'" *Queler v. Skowron*, 780 N.E.2d 71,77 (Mass 2002)).

As previously stated, the U.S. Supreme Court has held that the right to petition does not protect the statements of facts contained in a petition, concluding that there is no more protection for false statements made in the context of petitioning, (*McDonald*, 472 U.S. at 485); but the

Massachusetts Courts have concluded that all false statements/testimony are protected if the underlining petition is presented at a hearing initiated by the City, as in the case at bar.

Reasons For Granting The Petition

This case involves an important First Amendment/immunity issue and presents an opportunity for this court to correct a stark anomaly in the Massachusetts anti-SLAPP statute, being that the statute does not analyze the content of a petition when deciding the special motion to dismiss. The anti-SLAPP statute cannot be reconciled with either federal or state common law[24], or this Court's decision in *McDonald,* being that "[t]he right to petition is guaranteed, but the right to commit libel with impunity is not." *McDonald v. Smith,* 472 U.S. 479, 485 (1985). Massachusetts common law is clear that the anti-SLAPP statute protects only lawful petitioning activities, (*Duracraft,* 691 N.E.2d 935, (Mass 1998)), but the anti-SLAPP statute fails to examine the content of the petition in determining if the petition is lawful.

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[24] The *Adams* Court acknowledged that Massachusetts' anti-SLAPP statute is inconsistent with Massachusetts common law, but left the issue for the SJC. *Adams v. Whitman,* 822 N.E.2d at 729 (Mass App. Ct. 2005).

Using the Massachusetts Court's absurd thought process,[25] if an individual first correctly states their name and then gives false testimony at a government initiated non-judicial hearing, the testimony is always "protected" just because the witness had correctly stated their name, thus giving their testimony factual support pursuant to the anti-SLAPP statute. And since the Massachusetts Courts look to the "petitioning activity", but not the statements of fact contained in the petition, any petition/testimony presented at any government-initiated hearing has absolute immunity. [26]

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[25] While the *Baker* Court concluded that if the anti-SLAPP statute allowed further analysis the content of the petition, that this analysis would "essentially nullify the anti-SLAPP statute . . . [since] it would be a rare case in which a plaintiff was unable to attest to something said by the petitioner was untrue or misleading". *Baker v Parsons*, 750 N.E.2d. at 553 (Mass 2001) But, the statute does not specifically exclude further analysis of the content of the petition; and other states have versions of anti-SLAPP statues, although providing procedural benefits to the "petitioner," generally permit the non-moving party to show its own claim has merit as opposed to solely proving the lack of merit in the moving party's "petition". Please see, *e.g.*, CAL. CIV. P. § 425.16 (b)(1) (2004) (requiring moving party's to prove that they will likely prevail on their claims); Wilcox v. Superior Court of Los Angeles County, 27 Cal. App. 4th 809, 823-25 (Cal. Ct. App. 1994) (requiring the non-moving party to show its own claim has a "reasonable probability" of success, a threshold that is lower than "substantial probability").

[26] Again, the witness has absolute immunity since he is subject to neither civil nor criminal suit, (pains of perjury).

Massachusetts' anti-SLAPP statute has rendered private citizens defenseless against even the most baseless and outrageous accusations presented at government hearings, and has open the floodgates to an onslaught of reckless, outright lies presented as factual statements from behind an iron curtain of constitutional immunity. As in the instant case, the City can now solicit their employee to present false testimony at their hearings,[27] (such as a condemnation hearing), and the property owner has absolutely no recourse in the Massachusetts Courts[28] against the false testimony.[29] It is well established in this Court that "the knowingly false statement and the false statement made with reckless disregard of the truth, do not enjoy constitutional protection,"

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[27] It is the assertion of the Petitioner that Warren conspired with Inspector Kennedy to present false testimony/ statements at the condemnation hearing.

[28] The anti-SLAPP statute has been held by the First Circuit to be a state procedural rule that was inapplicable in federal court, see *Stuborn v. Bernstein*, 245 F.Supp.2d 312, (D. Mass., 2003).

[29] In the instant case, the condemnation hearing conducted by the City resembled what one would expect from a communist regime, were the party faithful present false testimony against innocent citizens. At the condemnation hearing, the hearing officer, building inspector and Warren are all employees of the City. The fact that a permit was pulled and the building was being re-sided was never taken into consideration. In addition, the hearing officer did not allow the Petitioner to review all the evidence/documents that was submitted to him, the Petitioner was told he had to submit a FIOA request to review the evidence. (This same hearing officer had just days earlier purchased a building that was condemned by the building inspector who testified at the condemnation hearing).

(*Garrison v. Louisiana*, 379 U.S. 64, 75 (1964)); while the right for the Petitioner and for others like him to go into court and obtain relief for an overt act of defamation is a constitutional right.

The underlining facts in the instant case have already been addressed by Congress on April 20, 1871 when the Ku Klux Klan, 17 Stat 13, was enacted, which in part is now codified as 18 U.S.C. § 1983. "During the debates, supporters of the bill repeatedly described the reign of terror imposed by the Klan upon black citizens and their white sympathizers . . .it was alleged that Klan members were obligated, by virtue of membership in the organization, to protect fellow members who were charged with criminal activity. They had a duty to offer themselves for service on grand and petit juries, and to violate their jurors' oaths by refusing to indict or to convict regardless of the evidence. They also were bound to appear as witnesses, and again to violate their oaths by committing perjury, if necessary, to exculpate their Klan colleagues." *Briscoe v. LaHue*, 460 U.S. 325, 337-338 (1983).

And in the instant case, while Inspector Kennedy has yet to commit arson, robbery, shootings or murder, he has for years attempted to extort the Petitioner's property;[30] and Warren, a

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[30] In 2003, Kennedy first told the Petitioner that he noticed that a black person occupied an apartment that the Petitioner owns, (this apartment is located on the same street that Kennedy resided on). Kennedy then relayed to the Petitioner if the apartment was not vacated, that he would boarded-up the building. From there, Kennedy then condemned and boarded-up the Petitioner's other building,

City employee, has involved himself in this conspiracy by falsely testified at the condemnation hearing. While the proponents of the Klu Klux Klan bill "were exclusively concerned with perjury resulting in unjust acquittals – perjury likely to be committed by private parties acting in furtherance of a conspiracy" was occurring in the courts of the Southern States, (*Briscoe*, 460 U.S.325,339(1983)); in the instant case, Warren does not have to rely on additional private parties to commit perjury or to violate their jurors' oath, (by refusing to convict regardless of the strength of the evidence), to obtain an unjust acquittal in the state court for his involvement in the RICO conspiracy, as the anti-SLAPP statue provided this service for Warren.

The Petitioner's lawsuit against Warren is itself a classic form of petitioning activity, which is protected by both the United States and Massachusetts Constitutions. The Plaintiff's fundamental rights to petition includes his access to the courts which derives from his First Amendment Rights of Free Speech and Right to Petition clause, (*McDonald v. Smith*, 412 U.S. 419, 482, 485), and the Massachusetts Constitution

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being the house that Warren resided in Kennedy then solicited Warren to appear as a witness at the condemnation hearing, where both Kennedy and Warren presented false statements. (Please note that Warren's false testimony gave Kennedy's false testimony credence, and visa versa.) Then Kennedy asked the Attorney General's office to petition the Housing Court to have an associate appointed as receiver for the Petitioner's building. In 2005, the Attorney General's Office submitted only one petition for receivership to the Boston Housing Court, being the Petitioner's building; the petition was subsequently denied

Declaration of Rights, Article XI, which guarantees that every citizen "ought to find a certain remedy, by having recourse to the laws, for all injuries of wrongs which he may receive in his person, property, or character" *Mass. Const.* Pt. 1, Art XI. This guarantee is buttressed by the right to a jury trial in Article XV of the Declaration of Rights, which provides: "[i]n all controversies concerning property, and in all suits between two or more persons . . . the parties have a right to a trail by jury; and this method of procedure shall be held sacred . . ." *Mass Const.* Pt. 1, Art. XV. The Massachusetts anti-SLAPP statute has clearly denied the Petitioner his constitutional right of access to the courts.

Numerous lower courts, with varying results, have already addressed the underlining question being presented to this court. In an amicus curiae brief submitted to the *Baker* court, the Massachusetts Attorney General advocated that the "sham exception" created by the *Noerr-Pennington* doctrine[31] should be applied in deciding an anti-SLAPP motion; the SJC subsequently adopted their recommendation. *Baker*, 750 N.E.2d 953. But, other courts have concluded that applying the "sham exception" to private parties, (both parties asserting that their

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[31] In combination, *Eastern Railroads v. Noerr Motor Freight*, 365 U.S. 127 (1961) and *United Mine Workers v. Pennington*, 381 U.S. 657 (1965) have created what is known as the *Noerr-Pennington* doctrine, *see City of Columbia v. Omni Outdoor Advertising, Inc.*, 499 U.S. 365, 379-80 111 S.Ct 1344, 1353-54, 113 L.Ed.2d 382 (1991).

petitions are constitutionally protected), is unconstitutional. The New Hampshire Supreme Court, in reviewing an anti-SLAPP bill, concluded that the proposed bill was unconstitutional. *Opinion of the N.H. Court on a ANTI-SLAPP Bill*, 641 A.2d 1012, 138 N.H. 445 (1994) The N.H. court stated that, unlike the procedure for determining a motion for summary judgment, "wherein the court does not resolve the merits of a disputed factual claim, the procedure in the proposed bill requires the trial court to do exactly that. *Id.* The court further concluded that the proposed bill violated New Hampshire's constitutional right to a jury trial, and stated: "A solution cannot strengthen the constitutional rights of one group of citizens by infringing upon the rights of another group". *Id.* In another case, *Clark v. Jenkins*, the Court of Appeals for the Seventh District of Texas decline to apply the "sham exception",[32] established by the U.S. Supreme Court for antitrust litigation, to private parties. *Clark v. Jenkins*, 248 S.W.3d 418, (2008). The *Clark* Court concluded that the *Noerr-Pennington* doctrine had no application in the defamation case. *Id.* In *Clark*, the plaintiff had filed suit for defamatory statements made in

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[32] The *Noerr-Pennington* doctrine basically holds that petitioning the government to take anticompetitive action does not violate antitrust laws. The *Omni* court described the doctrine as follows: [a] classic example is the filing of frivolous objections to the license application of a competitor, with no expectation of achieving denial of the license but simply in order to impose expense and delay. *City of Columbia v. Omni*, 499 U.S. 365, 379-80.

a memorandum intended to instigate an investigation by the federal government and thereby result in Clark being removed from office. The *Clark* Court further concluded, as did the *Omni* Court, that the *Noerr-Pennington* doctrine is "tailored . . . for the business world," and found the United States Supreme Court's holding in *McDonald* to be apropos. *Id.*

The Massachusetts Supreme Judicial Court has explained: "the right of petition protected in the anti-SLAPP statute is that right enumerated in the First Amendment to the United States Constitution . . . and in art. 19 of the Massachusetts Declaration of Rights." *Kobrin v. Gastfriend*, 443 Mass. at 333, quoting *Adams v. Whitman*, 822 N.E.2d 727,730 n.6. (Mass App Ct 2005). But, article 19 of the Massachusetts Declaration of Rights pertains to petitions submitted "to their representatives, and to request of the legislative body by the way of addresses, petitions, or remonstrances, redress of the wrongs done them, and of the grievances they suffer", (*Mass Const.* Pt.1, Art. XIX); the article clearly does not protect false testimony relayed at a City initiated hearing. Furthermore, the US Supreme Court has held "[t]he right to petition isguaranteed, the right to commit libel with impunity is not." *McDonald v. Smith,* 472 U.S. 479, 485 (1985).

Conclusion

As this Court has yet to address whether anti-SLAPP statutes unconstitutionally impinge on First Amendment rights, and whether anti-SLAPP statutes unconstitutionally protect "deliberate falsity and wanton, reckless disregard for the truth", the Petitioner now requests that his petition for writ of certiorari be granted.

Respectfully submitted,

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March 8, 2010

Appendix A

COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT FOR THE COMMONWEALTH

ORDER

It is hereby Ordered, that the following Application for Further Appellate Review be denied:

FAR-18329

JAMES DICKEY
vs.
JAMES WARREN

Suffolk Superior Court No. 2006-4080
A.C. No. 2007-P-1432

By the Court,

/s/ Susan Mellen
Susan Mellen, Clerk

ENTERED: December 22, 2009

Appendix B

JAMES DICKEY

v.

JAMES WARREN

MASSACHUSETTS APPEALS COURT

DOCKET	07-P-1432
Dates:	May 15, 2008. - October 28, 2009.
Present	*Perretta, Duffly, & Grainger, JJ.(1)*
County	*Suffolk*
KEYWORDS	"Anti-SLAPP" Statute. Constitutional Law, Right to petition government, Libel and slander. Libel and Slander.

Civil action commenced in the Superior Court Department on September 26, 2006.

A special motion to dismiss was heard by Peter M. Lauriat, J.

James Dickey, pro se.

Erin Whelan Pennock for the defendant.

PERRETTA, J. James Dickey, the former landlord of James Warren, brought an action in the Superior Court alleging that Warren had defamed him during a hearing conducted by the city of Boston's inspectional services department (department) to determine whether Dickey's residential apartment building should be condemned. Warren responded with a special motion to dismiss pursuant to G. L. c. 231, § 59H, commonly referred to as the "anti-SLAPP statute."(2) The judge concluded that Warren had satisfied his burden of demonstrating that his remarks were protected petitioning activity, while Dickey had failed to demonstrate that Warren's petitioning activity was "devoid of 'any reasonable factual support or any arguable basis in law.'" Fisher v. Lint, 69 Mass. App. Ct. 360, 363 (2007), quoting from Donovan v. Gardner, 50 Mass. App. Ct. 595, 599 (2000). We agree and affirm the dismissal of Dickey's complaint.

1. The facts. We set out the facts related in the judge's memorandum of decision as supported and supplemented by the parties' materials included in the record before us on Dickey's appeal. On December 15, 2002, Warren became a residential tenant in a three-family building owned by Dickey and situated at 97 Mount Ida Street in the Dorchester section of Boston. Several months later, in March or early April, 2003, Warren's roommate informed Dickey that there was a problem with the furnace for their apartment.

According to Dickey, the furnace was repaired the night of the roommate's complaint.

On August 25, 2003, the department granted Dickey a permit to repair and replace the siding on the building. Dickey began the permitted work on September 1, 2003. On September 16, while the permitted work was in progress, Edward Kennedy, an investigator with the department's division of investigation and regulatory enforcement, inspected the building and discovered many violations of the State Sanitary Code. See generally 105 Code Mass. Regs. §§ 410.831 et seq. (1997) (governing dwellings unfit for human habitation and condemnation and hearing process). Kennedy concluded that the entire building was unfit for human habitation and ordered that it be condemned and that its occupants vacate the premises "forthwith," i.e., September 16, 2003.

The department conducted a hearing on the condemnation on October 7, 2003.(3) As set out in the department's notice of decision, both Kennedy and Warren testified in support of the condemnation of the building. In an affidavit submitted to the Superior Court in connection with his special motion to dismiss, Warren stated that soon after moving into 97 Mount Ida Road he noticed a "severe soot and rodent problem with the apartment" and that he "testified against [Dickey]" at the condemnation hearing and at a trial on his civil complaint against Dickey.(4) Warren further

stated in his affidavit that "[a]s a result of the conditions cited by the [department], I was ordered to vacate the apartment." The conditions cited by Kennedy, the department's inspector, which led to the condemnation of the building as unfit for human habitation, and the order to vacate the building immediately, were based upon Kennedy's personal observations made during his inspection of the property on September 16, 2003.

There is nothing in Warren's affidavit that describes or otherwise intimates the contents or substance of his testimony at the condemnation hearing. However, according to the memorandum of law submitted by his attorney in support of his special motion to dismiss, Warren "indicated" at the condemnation hearing that "he moved out of the third floor apartment because of a problem with the furnace." Warren's affidavit also recites that the testimony he gave at the hearing and at trial on his complaint against Dickey was, "to the best of [his] knowledge, true."

Dickey averred in his affidavit in opposition to the special motion to dismiss that he was informed by Warren's roommate in late March or early April, 2003, that there was a problem with the furnace for their apartment and that he repaired the problem that same day. He also related that in May or June of 2003, he asked Warren why he had not been informed earlier about Warren's complaint regarding the furnace. According to Dickey, Warren explained that he was able to

block a heating vent in his bedroom and that "as far as [Warren] was concerned . . . it fixed the problem for him."

According to Dickey, Warren "indicated" at the condemnation hearing held on October 7, 2003, that "he moved out of [his] apartment because of problems with the apartment." Dickey further maintains that Warren later testified at the 2004 trial on his action against Dickey that he was living at 97 Mount Ida Road on September 16, 2003, when he was forced to vacate the apartment on that day because the house was boarded-up by the City of Boston."

2. The pertinent provisions of G. L. c. 231, § 59H. The first paragraph of G. L. c. 231, § 59H, as amended by St. 1996, c. 450, § 245, provides, in pertinent part:

"In any case in which a party asserts that the civil claims . . . against said party are based on said party's exercise of its right of petition under the constitution of the United States or of the commonwealth, said party may bring a special motion to dismiss. . . . The court shall grant such special motion, unless the party against whom such special motion is made shows that: (1) the moving party's exercise of its right to petition was devoid of any reasonable factual support or any arguable basis in law and (2) the moving party's acts caused actual injury to the responding party. In making its determination, the court shall

consider the pleadings and supporting and opposing affidavits stating the facts upon which the liability or defense is based" (emphasis added).(5)

The final paragraph of § 59H, inserted by St. 1994, c. 283, § 1, provides in pertinent part:

"As used in this section, the words 'a party's exercise of its right of petition' shall mean any written or oral statement made before or submitted to a legislative, executive, or judicial body, or any other governmental proceeding; any written or oral statement made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other governmental proceeding; any statement reasonably likely to encourage consideration or review of an issue by a legislative, executive, or judicial body or any other governmental proceeding . . ." (emphasis added).

3. The judge's decision. Dickey has not included a copy of his defamation complaint in the record appendix, but the motion judge set out in his memorandum of decision the gist of that complaint and Dickey's argument:

"Dickey argues that, in light of Warren's testimony at [the trial on his complaint against Dickey], it is clear that his testimony at the condemnation hearing was untrue and defamatory. Specifically, Dickey highlights Warren's testimony that he

moved out of his third floor apartment, presumably before the house was condemned, because of problems with the furnace. Dickey also points out that, at trial, Warren testified that he moved out of Dickey's house on the day it was boarded up by the City. As a result of Warren's testimony, Dickey alleges that he suffered significant damages." (Emphasis added.)

The judge further noted that Dickey's defamation complaint against Warren was based "only" on the statements Warren made at the condemnation hearing. The judge considered numerous appellate decisions involving G. L. c. 231, § 59H,(6) and concluded that Warren had met his burden of demonstrating that Dickey's claims against him were based upon his petitioning activities and had no substantial basis other than or in addition to those activities.

Next, the judge took up the question whether Dickey had met his burden of demonstrating, by a preponderance of the evidence, that Warren's exercise of his right to petition "was devoid of any reasonable factual support or any arguable basis in law and . . . caused actual injury to [Dickey]" (emphasis added). G. L. c. 231, § 59H. The judge concluded that Dickey had failed to meet his burden of proof on the first of the two requisite conditions, even assuming that any inaccurate statement made by Warren at the hearing caused Dickey actual harm. In short, the judge concluded

that Warren had met his burden of proof while Dickey had not.

3. Discussion. We take up Dickey's many and somewhat diffuse arguments to determine whether the judge's allowance of Warren's special motion to dismiss was based upon an abuse of discretion or other error of law. See Kobrin v. Gastfriend, 443 Mass. 327, 330-331 (2005). In so doing, we are mindful of the burden-shifting procedure most recently repeated in Benoit v. Frederickson, 454 Mass. 148, 152-153 (2009).

a. Warren's burden of proof. Our analysis begins with the judge's determination that Warren met his burden of demonstrating that Dickey's claims against him were based upon his "petitioning activities alone and have no substantial basis other than or in addition to the petitioning activities." Benoit v. Frederickson, supra at 152, quoting from Wenger v. Aceto, 451 Mass. 1, 5 (2008). Based upon the provisions of the final paragraph of G. L. c. 231, § 59H, see part 2, supra, and the materials before us, we see no error in the judge's conclusion that Warren's statements "were . . . at a minimum, made at a 'governmental proceeding.'" Dickey's argument to the contrary is refuted by the notice of decision from the Boston inspectional services department. It bears the seal of the city of Boston as well as the name of the mayor, and provides ample support for the conclusion that Warren's remarks were made

during a "governmental proceeding." See generally 105 Code Mass. Regs. § 410.831.

Citing Kobrin v. Gastfriend, 443 Mass. at 331-332, Dickey further argues that because Warren did not reside at 47 Mount Ida Road on October 7, 2003, the date of the hearing, his statements were not made for purposes of seeking redress and, therefore, were not protected petitioning activity. He contends that Warren "was acting only as a witness for the City of Boston." Dickey misreads Kobrin.

In Kobrin, the defendant had been retained as an expert by the Board of Registration in Medicine to assist in its investigation of the plaintiff's medical practices. The board ultimately dismissed the charges against the plaintiff, and he then sued the defendant based upon statements the defendant had made in the form of an affidavit submitted to the board. When the defendant sought the shelter of G. L. c. 231, § 59H, the plaintiff argued that the defendant had not been "petitioning the government, but rather was providing paid assistance to the government in its case." Id. at 330. The court denied the defendant the protection afforded by § 59H and held that § 59H "is designed to protect overtures to the government by parties petitioning in their status as citizens. It is not intended to apply to those performing services for the government as contractors."(7) Id. at 332. Dickey's misguided reading of Kobrin would make every tenant of the building on September 26,

2003, a potential defendant in a defamation action had he or she chosen to testify at the condemnation hearing. Warren was a party affected by the condemnation order. See 105 Code of Mass. Regs. § 410.851 (1997) (requiring that all "affected parties" be given notice of the date, time and place of the hearing" and providing that "affected parties shall include the occupants of all affected premises").

Warren was also required to demonstrate that Dickey's claims against him "have no substantial basis other than or in addition to his petitioning activities," Benoit v. Frederickson, 454 Mass. at 152, quoting from Duracraft Corp. v. Holmes Prod. Corp., 427 Mass. 156, 167-168 (1998). The judge stated in his memorandum of decision that "Dickey's complaint makes clear that the sole basis for his defamation claim is Warren's alleged false testimony at the condemnation hearing," and although Dickey failed to include a copy of his defamation complaint in the record appendix, his claims are apparent from the materials that were included as well as from the arguments set out in his brief. We see no abuse of discretion or other error of law in the judge's conclusion that Warren met his burden of showing that Dickey's claims against him were based upon his petitioning activity alone and had no substantial basis other than or in addition to that activity.

b. Dickey's burden of proof. Once Warren satisfied his burden of proof, the burden shifted to Dickey to

show by a preponderance of the evidence that Warren's "petitioning activities were devoid of any reasonable factual support or any arguable basis in law and that the petitioning activities caused [Dickey] actual harm." Benoit v. Frederickson, supra at 153. The judge concluded that because Dickey admitted that "there were problems with the furnace in Warren's apartment . . . regardless of Warren's alleged inaccurate statement on the timing of his move," Dickey failed to meet his burden of showing that Warren's testimony at the condemnation hearing was, as required by G. L. c. § 59H, "devoid of any factual support or any arguable basis in law." The judge's conclusion is supported by statements made by Dickey in his affidavit.

Although the judge assumed for purposes of decision that Warren's act caused Dickey actual injury, he noted that "[i]t is unclear, from the record before this court, how crucial Warren's testimony was in upholding the condemnation." We agree and further conclude that Dickey also failed to meet his burden of proof of showing that Warren's acts caused him any "actual injury."

Dickey sets out in his affidavit the various expenses he incurred as a result of the department's condemnation order. However, as shown by the department's decision, the condemnation of Dickey's building was based upon the numerous violations of the State Sanitary Code observed by Kennedy during his inspection of

the building on September 16, 2003. None of the cited violations that resulted in the condemnation of the building concerned the furnace.(8)

On the state of the record before us, we see no error in the judge's conclusion that while Warren had satisfied his burden of proof, Dickey had failed to meet his and that, consequently, Warren was entitled to the dismissal of Dickey's action against him.

Judgment affirmed.

footnotes

(1) Justice Perretta participated in the deliberation of this case and authored this opinion prior to her retirement.

(2) SLAPP is an acronym for Strategic Lawsuits Against Public Participation.

(3) Neither we nor the judge have had the benefit of a transcript of the condemnation hearing.

(4) Warren brought an action against Dickey to recover damages based on the substandard condition of the apartment he had rented. According to Warren, the jury returned a verdict in his favor and awarded him monetary damages.

(5) We construe the word "shall" as used in the language quoted above as requiring a judge to

consider the pleadings and parties' affidavits but not precluding consideration of any other materials presented and determined to be relevant in deciding the § 59H motion.

(6) See, e.g., Duracraft Corp. v. Holmes Prod. Corp., 427 Mass. 156, 161 (1998); Baker v. Parsons, 434 Mass. 543, 553-554 (2001); Office One, Inc. v. Lopez, 437 Mass. 113, 122 (2002); Kobrin v. Gastfriend, 443 Mass. 327, 338 (2005).

(7) As noted by the court in Kobrin, supra at 332 n.8:

"No definition of the phrase ['a party's exercise of its right of petition'] will encompass every case that falls within the statute's reach, and some difficult factual situations will have to be assessed on a case-by-case basis. What we seek to do is to limit the statute's protection, in accordance with the legislative intent, to the type of petitioning activity the Constitution envisions in which parties petition their government as citizens, not as vendors of services."

(8) The numerous violations cited by the department in its decision were: soffits and boards missing from the exterior, exposing the interior to the elements, rodents, squirrels; stairs in danger of collapse; second means of egress blocked by garbage and debris; lack of working fire detection system in front and rear units; basement completely filled with debris and no access to gas, electrical, or water shut-off valves in case of an emergency; side and rear yard filled with garbage, debris, fire hazards, and heavy rodent infestation.

Appendix C

GENERAL LAWS of MASSACHUSETTS

PART III. COURTS, JUDICIAL OFFICERS AND PROCEEDINGS IN CIVIL CASES

TITLE II. ACTIONS AND PROCEEDINGS THEREIN

CHAPTER 231. PLEADING AND PRACTICE

PRACTICE

Speedy Trial of Certain Actions for Malpractice, Error or Mistake

Chapter 231: Section 59H. Strategic litigation against public participation; special motion to dismiss

Section 59H. In any case in which a party asserts that the civil claims, counterclaims, or cross claims against said party are based on said party's exercise of its right of petition under the constitution of the United States or of the commonwealth, said party may bring a special motion to dismiss. The court shall advance any such special motion so that it may be heard and determined as expeditiously as possible. The court shall grant such special motion, unless the party against whom such special motion is made shows that: (1) the moving party's exercise of its right to

petition was devoid of any reasonable factual support or any arguable basis in law and (2) the moving party's acts caused actual injury to the responding party. In making its determination, the court shall consider the pleadings and supporting and opposing affidavits stating the facts upon which the liability or defense is based.

The attorney general, on his behalf or on behalf of any government agency or subdivision to which the moving party's acts were directed, may intervene to defend or otherwise support the moving party on such special motion.

All discovery proceedings shall be stayed upon the filing of the special motion under this section; provided, however, that the court, on motion and after a hearing and for good cause shown, may order that specified discovery be conducted. The stay of discovery shall remain in effect until notice of entry of the order ruling on the special motion.

Said special motion to dismiss may be filed within sixty days of the service of the complaint or, in the court's discretion, at any later time upon terms it deems proper.

If the court grants such special motion to dismiss, the court shall award the moving party costs and reasonable attorney's fees, including those incurred for the special motion and any related discovery matters. Nothing in this section shall affect or preclude the right of the moving party to any remedy otherwise authorized by law.

As used in this section, the words "a party's exercise of its right of petition" shall mean any written or oral statement made before or submitted to a legislative, executive, or judicial body, or any other governmental proceeding; any written or oral statement made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other governmental proceeding; any statement reasonably likely to encourage consideration or review of an issue by a legislative, executive, or judicial body or any other governmental proceeding; any statement reasonably likely to enlist public participation in an effort to effect such consideration; or any other statement falling within constitutional protection of the right to petition government.

Appendix D
(Petitioner's FAR Petition to SJC, pages 17-19)

VI. Conclusion.

The analysis of the Appeals Court does not consider whether the statement that is central to Appellant/Dickey's complaint, (being that Appellee/ Warren stated that he moved out of the apartment due to the condition), has factual support or caused actual damage. By doing so, the Appeals Court granted the Appellee/ Defendant absolute immunity for his false statements at the condemnation hearing. The legislature never intended the anti-SLAPP statute to be an absolute privilege, (*Duracraft v. Holmes*, 427 Mass at 162-163), but the Appeals court decision does so. In the defamation context, it is clear that Appellee/Defendant's statements are actionable, and his actions are part of a larger RICO conspiracy in which the Defendant conspired with Inspector Kennedy to extort property from the Appellant/Plaintiff.

The United States Supreme Court confirmed decades ago, "[t]here is no constitutional value in false statements of fact.", (*Gertz v. Robert Welch*, 418 U.S. 323, 340 (1974)), and further concluded that there is no more protection for false statements made in the context of petitioning. *McDonald*, 472 U.S. at 485.

While the Appellant/Plaintiff filed a complaint alleging defamation, the Plaintiff could have filed a conspiracy complain in the

Massachusetts Federal District Court against Appellee/Warren's due to his involvement in the RICO enterprise.[33] But, to keep thing simple, the Plaintiff chose to file a complaint in a Massachusetts court; this decision should not bar his constitutional right to petition a court to seek redress for his own grievances. Under the first amendment one has a right to petition by filing a lawsuit; however, if the action is frivolous, then

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[33] What is also of interest is that a portion to the Plaintiff's RICO claim, (District Court No 2007cv11717 NMG), has already been presented to this court. In FAR 17182, (*City of Boston v. Rochalska*), Marian Sklodowski alleged that a court appointed receiver, Jonathan Kaye, had defrauded the Boston Housing Court by submitting false invoices to the Boston Housing Court for his receiver expenses. What Jonathan Kaye did was give two checks to his contractor, ($47,000 and $44,525), who cashed the checks and then within days wrote out a check to Jonathan Kaye's company Combined Resources for the same amount. But, Mr. Kaye included these two checks in his final account to the Boston Housing Court, thus committed fraud. In an attempt to put an end to the RICO enterprise, Marian Sklodowski asked that this court find that a fraud had occurred and bar Jonathan Kaye from recovery of his receiver expenses. This court declined to allow FAR 17182, which allowed Jonathan Kaye, Edward Kennedy and John Meaney to then extort a building located at 20 Claybourne Street, and attempt to extort the Plaintiff's building located at 97 Mt Ida. As stated in the Appellant/Dickey affidavit, Edward Kennedy and John Meaney also extorted 27 G Street, see *Addendum pages 8-9*. (What is unbelievable is that the Boston Housing Court continued to appoint Jonathan Kaye as a receiver even though his false invoice were fully disclosed in *City of Boston v. Rochalska*, and that the Appeals Court and the Supreme Court did nothing to stop the RICO enterprise.)

there are sanctions available but the lawsuit is to be filed in order to avoid the deprivation of the right to petition. See *Phillips v. Kerry,* 438 F. 2nd 207, 208 (U.S.C.A. 10, 1981). This lawsuit in the instant case is far from frivolous.

For the foregoing reasons, this application should be granted.

Respectfully submitted,

Pro Se Plaintiff,

/s/ James Dickey

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